

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

IN RE: COMPLAINT OF BIRCH
TELECOM AGAINST BELL SOUTH
TELECOMMUNICATIONS, INC. AND
PETITION FOR DECLARATORY
JUDGMENT

2002 JUN 21 00 00 715
) DOCKET NO.
) OFFICE OF THE
EXECUTIVE SECRETARY

COMPLAINT AND PETITION FOR DECLARATORY JUDGMENT

Birch Telecom of the South, Inc. ("Birch") files the following Complaint against BellSouth Telecommunications, Inc. ("BellSouth") and Petition for Declaratory Judgment.

THE PARTIES

1. Birch is a competitive telecommunications carrier operating in eleven states. On July 20, 2000, Birch received a certificate of public convenience and necessity to offer telecommunications services in Tennessee. TRA Docket No. 00-00341.
2. BellSouth is an incumbent, local exchange telephone carrier offering telecommunications service in Tennessee.
3. Correspondence concerning this Complaint and Petition should be sent to Birch's attorneys:

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Boult, Cummings, Conners and Berry, PLC
414 Union Street, Suite 1600
Nashville, Tennessee 37219
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hwalker@boultcummings.com

Rose Mulvany Henry
Birch Telecom, Inc.
2020 Baltimore Ave.
Kansas City, MO 64108
Ph. 816-300-3731
rmulvany@birch.com

JURISDICTION

4. The Tennessee Regulatory Authority ("TRA") has jurisdiction to interpret and enforce interconnection agreements approved by the TRA pursuant to Section 252 of the federal Telecommunications Act.

5. Pursuant to T.C.A. § 4-5-223, the TRA has jurisdiction to render a declaratory judgment concerning the applicability of a statute, rule, or order within the primary jurisdiction of the agency.

6. Pursuant to T.C.A. § 65-4-117 and T.C.A. § 65-5-208(c), and TRA Rules 1220-1-2-.09 and 1220-4-8-.09(b), the TRA has jurisdiction to hear complaints of anti-competitive conduct.

STATEMENT OF FACTS

7. On July 14, 2000, Birch and BellSouth entered into an interconnection agreement (the "Agreement") pursuant to Section 252 of the federal Telecommunications Act (42 U.S.C. § 252). The Agreement was reviewed and approved by the TRA on December 12, 2000. *See* TRA Docket No. 00-00904.

8. Section 9.1 of the Agreement contains the following language regarding Birch's use of the BellSouth name, service mark or trademark:

Birch is strictly prohibited from any use, including but not limited to in sales, in marketing or advertising of telecommunications services, of any BellSouth name, service mark or trademark, except that (1) Birch may make factual references to the BellSouth name in response to a customer or potential customer inquiry regarding the source of the underlying services or the identity of repair technicians, and (2) Birch may use the BellSouth name in comparative advertising as long as the reference is truthful and factual, does not relate to the source of the underlying service and does not imply any agency relationship, partnership, endorsement, sponsorship or affiliation by or with BellSouth.

9. Birch offers customers a variety of telephone service options described in the carrier's tariffs as "Birch Basic Business Line," "Birch Bells Business Features Package," a product which allows the customer to add three calling features to the basic business package, and "Birch Bells & Whistles Business Features Package," which allows the customer to add seven features. Copies of the applicable tariff pages are attached.

10. Birch also uses the product names "Birch Basic," "Birch Bells," and "Birch Bells and Whistles" in sales materials and on its company website, found at <http://www.birch.com>. . A copy of the sales material describing these products is attached.

11. The words "bells" and "whistles" as used in these product names refer to various features, *ie.* bells and whistles, which a customer may select in addition to basic service. The product names are derived from the commonly used phrase, "bells and whistles," which is defined in Webster's Collegiate Dictionary (10th ed., 1999), as "items or features that are useful or decorative but not essential; frills." Birch uses these product names in all eleven states and has used them since Birch first began operations in Missouri in January, 1999.

12. By letter dated June 10, 2002, attorneys representing a BellSouth affiliate informed Birch that the use of the word "Bells" in describing Birch products constitutes the "use" of the trademark "Bell" in violation of Section 9.1 of the Agreement.¹ The letter threatens legal action against Birch unless Birch agrees in writing by June 20, 2002, to discontinue using the word "Bells" in describing Birch products and to destroy all tangible material upon which the product name appears.

¹ The letter also makes allegations under federal trademark law, but those issues are outside the purview of the Authority.

REQUESTED RELIEF

13. Birch requests that the TRA issue a declaratory judgment that the use of the product names "Birch Bells Business Features Package," "Birch Bells," and "Birch Bells & Whistles Business Features Package," to describe Birch's telecommunications services does not violate Section 9.1 of the Agreement.

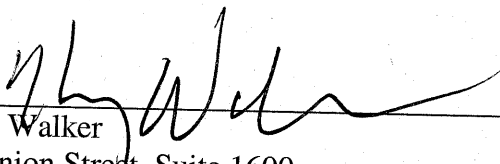
14. Birch asks the TRA to find that BellSouth's threats of legal action against Birch based on these alleged violations of the Agreement are baseless and intended to harass and intimidate Birch, cause Birch to waste time and resources responding to those threats, and deprive Birch of the benefit of continuing to use product names which consumers associate with Birch services. The TRA should further find that such threats constitute an anti-competitive practice in violation of T.C.A. § 65-5-208(d) and are prohibited.

15. The TRA should grant Birch such further relief as may be justified based on the record developed in this proceeding and applicable law.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: _____

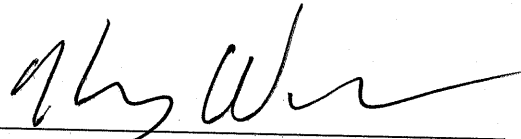

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded via fax or hand delivery and U.S. mail to the following on this the 20th day of June, 2002.

Guy Hicks, Esq.
BellSouth Telecommunications, Inc.
333 Commerce St., Suite 2101
Nashville, TN 37201-3300

A handwritten signature in black ink, appearing to read "H Walker", written over a horizontal line.

Henry Walker

4. SERVICES (continued)

4.2 General Exchange Services

4.2.2 Birch Basic Business Line and Trunk

- A. Birch Basic Business Line and Trunk is available within the Service Areas as defined in Section 3 of this Tariff.

	Monthly Rates	
	Rate <u>Group A</u>	Rate <u>Group B</u>
One Flat Rate 1-Party Line	\$33.00	\$33.00
--with 24-Month Commitment	\$31.00	\$31.00
One Flat Rate Trunk	\$60.50	\$61.50
--with 24-Month Commitment	\$57.00	\$58.00
Installation Charge (1)	\$50.00	\$50.00

(N)

(N)

4. SERVICES (continued)

4.2 General Exchange Services (continued)

4.2.3 Birch Bells Business Features Package

Birch Bells Business Features Package is available within the Service Areas as defined in Section 3 of this Tariff.

	<u>Monthly Rate</u>	<u>Installation Charge (1)</u>
Any three features from the Bells Feature List below.	\$7.00	\$10.00

Any of the following calling features may be added to the Birch Bells Business Features Package. The following rates apply only when these calling features are added to the Birch Bells Business Features Package. To add calling features to any other service, please refer to Section 4.2 for applicable rates.

Features

Anonymous Call Reject
Auto Redial
Call Blocker
Call Forwarding - Variable
Call Forwarding Busy Line/No Answer
Caller ID Name & Number

(T)

4. SERVICES (continued)

4.2 General Exchange Services (continued)

4.2.4 Birch Bells & Whistles Business Features Package

Birch Bells & Whistles Business Features Package is available within Exchange Area as defined in Section 3 of this Tariff.

	<u>Monthly Rate</u>	<u>Installation Charge (1)</u>
Any seven features from the Bells and Whistles Feature List	\$13.00	\$10.00

Any of the following calling features may be added to the Birch Bells & Whistles Business Features Package. The following rates apply only when these calling features are added to the Birch Bells & Whistles Business Features Package. To add calling features to any other service, please refer to Section 4.2 for applicable rates.

Features

Anonymous Call Reject
Auto Redial
Call Blocker
Call Forwarding Variable
Call Forwarding Busy Line/No Answer
Caller ID Name & Number

(T)

Local service

Birch Basic

Birch Basic lines are a reliable foundation for your business' local phone service, fax communications and Internet connections. These lines are available for a low, flat monthly fee and with lots of options. You can order Birch Basic lines with features added a la carte, with customized feature packages, or with no features at all.

If you have two or more Birch Basic lines, you can add Hunting for a low monthly per-line fee. When a caller dials your primary business number and that line is already in use, Hunting allows the call to "hunt" for the next available line, thereby reducing the likelihood of your callers hearing a busy signal.

Birch Bells

For greater efficiency and convenience throughout your office, the Birch Bells package lets you choose the most useful calling features to help you manage day-to-day business. For a low, flat monthly fee, you may select any three features from the chart below to add to your Birch Basic lines. Birch Bells not only boosts your office productivity, it's a great value.

Birch Bells & Whistles

When your employees need feature-rich phone service to get their jobs done, you can rely on the Birch Bells & Whistles package to give them the advanced functionality typically found in an on-premise phone system. But you won't have to shell out the dollars to buy one. For a low, flat monthly fee, your Birch Basic lines can have any seven features from the chart below.

Features	Birch Basic	PICK 3	PICK 7
		Birch Bells	Birch Bells & Whistles
Anonymous Call Rejection	a la carte	✓	✓
Auto Redial	a la carte	✓	✓
Call Blocker	a la carte	✓	✓
Call Forwarding – Busy Line/No Answer	a la carte	✓	✓
Call Forwarding – Variable	a la carte	✓	✓
Call Return	a la carte	✓	✓
Call Transfer Disconnect	a la carte	✓	✓
Call Waiting	a la carte	✓	✓
Call Waiting ID Options	a la carte	✓	✓
Caller ID Name & Number	a la carte	✓	✓
Caller ID on Call Waiting	a la carte	✓	✓
Distinctive Ring 2nd or 3rd Number	a la carte	✓	✓
Priority Call	a la carte	✓	✓
Remote Access to Call Forwarding	a la carte	✓	✓
Selective Call Forwarding	a la carte	✓	✓
Simultaneous Call Forwarding	a la carte	✓	✓
Speed Calling (30)	a la carte	✓	✓
Three-Way Calling	a la carte	✓	✓